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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 742

TRANSAMERICAN FREIGHT LINES, INC.,
PETITIONER,

v.

LOCUST CARTAGE CO., INC.,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Questions Presented

1. May Petitioner claim a denial of due process of law, despite the fact that the Commission's[1] Declaratory determination was made on the basis of evidence and argument by the parties and in the light of Petitioner's exception to the recommended report, and Petitioner did not

[1] Interstate Commerce Commission.

avail itself of the opportunity provided by Rule 53 of the Commission's General Rules of Practice to request an oral hearing or cross-examination of the witnesses, or the opportunity provided by Rules 101 and 102 of said General Rules of Practice to seek reconsideration of the report, or the right provided by the Administrative Procedure Act (5 U.S.C. Section 702) to seek judicial review?

2. Could it rationally be said that the Court of Appeals usurped the function of the District Court as the ultimate finder of facts in concluding that the issue as to Respondent's legal obligation to charge its published rates fell within the primary jurisdiction of the Commission to determine, and that the Commission having resolved the issue, it was error for the District Court to disregard such findings and to substitute its own findings and conclusions for those of the Commission in an area within the Commission's primary jurisdiction?

3. Can the application by the Court of Appeals of the doctrine of primary jurisdiction and its upholding thereunder of the Commission's findings and conclusions be defeated by the interposition of the doctrines of estoppel and *pari delicto*?

4. Does the decision of the Court of Appeals conflict with the decision of another court or this Court, or depart so far from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision or otherwise raise a question of fundamental importance as to require a decision by this Court?

Statutes and Rules of Court Involved

Relevant portions of 5 U.S.C. Sections 554, 706; 28 U.S.C. 1336; 49 U.S.C. 316, 317; Interstate Commerce Commission General Rules of Practice, Rules 53, 101 and 102; Supreme Court Rules, Rule 56(4) are printed in Appendix A hereto.

Statement of the Case

In accordance with Rule 40(3) of the Rules of the Supreme Court of the United States, Respondent makes no statement of the case other than the following which it deems necessary to correct inaccuracies or omissions in the Petitioner's Statement:

Respondent's complaint in this proceeding, in accordance with the provisions of Title 49 U.S.C. Sections 316(b) and 317, seeks recovery of the difference between the amount due under its tariffs filed with the Interstate Commerce Commission as published by the New England Motor Rate Bureau, Inc., agent, and the amount paid it by the Petitioner.

On November 29, 1966 the District Court ordered (Petitioner's Brief, Appendix C, Page 40)

> "Both parties will seek to secure an informal or if possible, a formal ruling from the Interstate Commerce Commission as to whether in its opinion the agency tariffs of New England Motor Rate Bureau, Inc. would apply to the carriage of Locust Cartage Company, Inc. upon the following assumptions:"
> (For full text see Petitioner's Brief, Appendix C, pages 42, 43).

The fourth assumption appearing on Page 4 of the Petitioner's Brief as a quote from the full order of the Court fails to include the full text of the assumption as follows:

> "The fourth assumption is that Transamerican Freight Lines, Inc. did not have complete control of the operations of Locust Cartage Company, Inc. *With respect to the fourth assumption, a more detailed statement may be made by the parties.*" (emphasis supplied.)

On December 14, 1966 in compliance with the court order, Locust sought a ruling from the Commission. By letter dated March 1, 1967 (Petitioner's Brief, Appendix D, page 45) the Commission submitted to the District Court an informal opinion predicated upon the assumptions enunciated in the District Court order.

When the matter was called for trial in October of 1967 the District Court granted Transamerican's motion to stay action in that Court, which motion stated, in part,

> "... that there are certain underlying factual issues which are determinative of the rights of the parties to this action which are within the primary jurisdiction of and/or must properly be resolved by the Interstate Commerce Commission."
> (Respondent's Brief, Appendix B, p. 29).

The Court ordered Transamerican to file a petition for declaratory order before the Interstate Commerce Commission. The Commission accepted the petition and ordered the matter for handling under its Rules for Modified Procedure. The parties accepted the Commission's order, made no request for cross-examination or other oral hearing and issue was joined. Both parties submitted arguments and extensive affidavits to the Commission. On the basis of these affidavits the Interstate Commerce Commission trial examiner concluded that Locust's operations exhibited the characteristics of a common carrier rather than those of a mere cartage operator and that Locust was therefore bound to charge its published tariff for services outside the commercial zone of Boston. Division 2 of the Commission affirmed, 355 I.C.C. 46 (1969). No action for review was filed in this case within the time allotted. 28 U.S.C. Section 1336(c).

Approximately six months after the completion of the

Commission's proceedings both parties filed motions for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure on Count One only of Locust's complaint. For the convenience of the Court, the parties and the purpose of the motions for summary judgment, the parties stipulated as to certain facts contained in the evidence previously submitted to the Commission, all of which, attached to and made part of the stipulation, were before the Court.

The District Court granted judgment for Transamerican on Count One of the complaint (Petitioner's Appendix A p. 21). The District Court rejected the Commission's findings on the evidence submitted to the Commission, the Court stating that the Commission's report was merely advisory and that the Commission had proceeded on the mistaken premise that the District Court assumed Locust had been acting as an independent carrier (Petitioner's Appendix A, pages 24-26). Locust appealed to the Court of Appeals for the First Circuit which reversed the District Court and held that the decision of the Interstate Commerce Commission on the issue of Locust's obligation to charge its published rates became final and binding on the District Court. (Petitioner's Brief, Appendix B, page 36).

Argument

I. The Petitioner Was Not Denied Due Process of Law.

The Respondent respectfully submits that the "Questions Presented for Review" by the Petitioner in its brief are not expressed in the terms and circumstances of the case as required by Rule 40 (d)(1) of the Rules of the Supreme Court of the United States and Respondent has therefore restated the substance of those questions using as a basis the facts as found.

The Petitioner was neither denied due process nor entitled to a trial de novo after:

a. Invoking the primary jurisdiction of the Interstate Commerce Commission in an action pending in the District Court;
b. Petitioning the Interstate Commerce Commission for a hearing and declaratory order under 5 U.S.C. Section 1004 (now 5 U.S.C. 554(e));
c. Having had full opportunity to submit and having submitted all its evidence and arguments under the Commission's Modified Procedure;
d. Failing to seek cross-examination or oral hearing;
e. Failing to take steps for administrative review of the Commission's order by Division 2;
f. Failing to seek judicial review and
g. Moving for summary judgment upon all the evidence submitted to the Commission after the expiration of the time for seeking judicial review.

In its statement of the case the Petitioner while stating that it had moved to stay action in the District Court (Petitioner's Brief page 4) neglected to set forth the grounds upon which it sought the stay. Petitioner's motion (Respondent's Appendix B, p. 29) stated that the action should "be stayed for the reason that there are certain underlining (sic) factual issues involved which are determinative of the rights of the parties to this action which are within the primary jurisdiction of and/or must be properly resolved by the Interstate Commerce Commission."

The Respondent agrees. The Petitioner cited seven cases (Respondent's Appendix B, page 29) which clearly and correctly support the motion.

The Petitioner contends that the Commission erred in

confining itself to the four assumptions set down in the District Court's order. (Petitioner's Appendix C, page 41).

The first assumption concerning the question of whether or not, "there was an oral agreement or a novation of a written agreement under which Locust Cartage Company, Inc. agreed to carry for Transamerican Freight Lines, Inc. goods which were covered by shipping contracts between Transamerican Freight Lines, Inc. and its customers.", is purely a question of contract law within the proper jurisdiction of the District Court and not of the Commission.

As to the second and third assumptions that the actual carriage was within points Petitioner was authorized to serve and that the shippers paid Petitioner as though it had performed the service, there was no serious dispute. The Respondent contends that these assumptions were immaterial.

The fourth assumption is the basis for Petitioner's defense to the action and is the cornerstone of its contention that it has been deprived of due process. In this regard the District Court stated:

> "The fourth assumption is that Transamerican Freight Lines, Inc. did not have complete control of the operations of Locust Cartage Company, Inc. *With respect to the fourth assumption, a more detailed statement may be made by the parties.*" (Emphasis supplied) (Petitioner's Appendix C, page 43).

The parties submitted evidence and argument to the Commission. On the basis of this evidence, the Interstate Commerce Commission hearing examiner concluded that Respondent's operations exhibited the characteristics of a common carrier rather than those of a mere cartage operator and that Respondent was therefore bound to charge

its published tariff for service outside the commercial zone of Boston.[2]

In its brief to the Court of Appeals Petitioner said:

> "The chief ... 'underlying factual issue' asserted to be within the expertise of the Commission was the issue of whether Transamerican 'controlled' Locust's operation since a determination that Transamerican did control Locust's operation would, by itself, terminate the matter."

Conversely, a determination that Petitioner did not control Respondent's operations would likewise terminate the matter. Thus, following Petitioner's own contention, this matter has been terminated by the finding by the Commission and the District Court, affirmed by the Court of Appeals, that Petitioner did not control Respondent's operations.

The Commission (Division 2) in its Decision (Petitioner's Appendix F at page 60) stated:

> "Although the Court assumed a lack of complete control by Transamerican, the parties submitted evidence and argument directed to this issue and the examiner found that the facts supported such a finding. The examiner concluded that Respondent's use of its own equipment and routing under its own authority and the employment of its own drivers gave credence to the assumption that there was an independent operation by Locust. He further concluded that the intention of the parties was that Locust was to be an independent contractor, and that an exclusive agency was not contemplated. Thus the actions of Locust in ob-

[2] Exempt under 49 U.S.C. Section 302(c)(2)—49 C.F.R. Section 1057.

taining its operating authority as a common carrier were not inconsistent with its original intention." (Petitioner's Appendix F, page 70).

The District Court in reviewing the same evidence found: (Petitioner's Appendix A), "Defendant did not control plaintiff's operations." (page 23), substituted its finding that plaintiff was "defendant's exclusive agent" (page 25) and concluded "plaintiff at the relevant dates was operating not as a common carrier but merely as an independent contractor who was not a common carrier." (page 26).

Although, as will be shown later, the Court of Appeals was correct in ruling that the District Court erred in substituting its own findings and conclusions for those of the Commission, it is to be noted that nowhere in the Interstate Commerce Act is there any provision for performance of a transportation service of the type here involved by an "independent contractor who was not a common carrier."

Having all the evidence before it, the Commission rightly concluded that the answer to the Court's direction, "that the ruling should determine the applicable tariffs for the movements handled by Locust for Transamerican" (Petitioner's Appendix F, page 60) was:

> "We find that, as to the involved movements which took place outside the commercial zone of Boston, Mass., between February 8, 1962 and October 14, 1964, the date on which it joined the tariffs of the Eastern Central Motor Carriers Association, Inc., the tariffs of the New England Motor Rate Bureau, Inc., (Locust's tariff agent) applied for those portions of the movement handled by Locust Cartage Co., Inc., a common carrier by Motor vehicle, or its predecessor." (Petitioner's Appendix F, page 63)

The Petitioner, however, argues that despite an informal staff opinion, (Petitioner's Appendix D, page 45), which Petitioner rejected and a formal opinion, *Transamerican Freight Lines, Inc. — Petition For Declaratory Order* 335 I.C.C. 46 (all of which proceedings took from September 30, 1966 to May 7, 1969 to complete), the decision of the Commission was merely an "advisory opinion" and as such subject to de novo review.

In the instant case the Court of Appeals (Petitioner's Brief Appendix B, pages 34, 35) held that the Commission's statement:

> "The function of the Commission in this proceeding is to render administrative aid to the Court. Therefore, the examiner was correct in confining his consideration of the issue to those reflecting the Court's assumption" 335 I.C.C. at 50,

was "an accurate description of the limited administrative role in cases which raise both broad issues of regulatory policy and specific questions of contractual liability. See, e.g. *Thompson Trustee* v. *Texas Mexican Railway System, Inc.*, 328 U.S. 134 (1946)." This case was cited by Petitioner as authority for granting its motion to stay proceedings (Respondent's Brief Appendix B, page 29).

To bolster its retreat from its contention previously urged before the District Court that the Commission had primary jurisdiction, the Petitioner now contends that *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (previously asserted as its authority for invoking the primary jurisdiction doctrine) is its authority for holding that the Commission's decision is not binding. In *Pennsylvania Railroad Co.* v. *United States*, 363 U.S. 202, 205 citing *Rochester Telephone Corp.* v. *United States*, supra, the Court stated:

> "We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that legal consequences will flow from it is reviewable..."

The finding by the Commission that Locust's published tariff applied rather than those contained in a private agreement had, as a published opinion, an immediate and practical effect on all carriers similarly situated.

> "The determination made by the Commission is therefore not abstract, theoretical or academic." *Pennsylvania Railroad Co.* v. *United States,* supra.

The Commission's order was both declaratory and reviewable. *Frozen Food Express* v. *United States,* 351 U.S. 40. See *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.,* 383 U.S. 576, 602, 604.

The petitioner attaches significance to the form of the Declaratory Order issued by the Commission. The proceeding before the Interstate Commerce Commission was initiated by Petitioner's *petition for Declaratory Order* and the Commission rendered its *declaratory determination* that the tariffs of the New England Motor Rate Bureau, Inc., Respondent's agent, applied to the involved transportation service. This determination by the Commission was a *Declaratory Order* sought by the Petitioner. *Shannahan* v. *United States,* 303 U.S. 596, 599 (cited in Petitioner's Brief p. 11) involved the so-called Negative Order Doctrine and is inapposite. The Court has in many instances stated that an order does not have to be coercive to be binding. *Pennsylvania Railroad Co.* v. *United States,* supra. See *Lester C. Newton Trucking Company* v.

United States, 209 F. Supp. 600 *affirmed* 372 U.S. 702, in which an "interpretive order" was declared reviewable.

The argument "If such promulgations are not subject to judicial review, it is surely because they are not final or binding on the parties involved" (Petitioner's Brief, page 11) falls of its own weight. *Riss & Co.* v. *Interstate Commerce Commission*, 179 F2d 810; *Washington Terminal Co.* v. *Boswell*, 124 F2d 235.

The Petitioner's argument that the Commission's finding was a conclusion of law and not one of fact and therefore the District Court was free to disregard it is answered in *Seaboard Airline Railroad Co.* v. *United States*, 387 F2d 651, where the plaintiff argued that the issue referred to the Commission was one of law and not of fact and therefore not binding. The Court held that the plaintiff was not entitled to a trial de novo as the reference had been made on its motion and that the 1964 amendment to 28 U.S.C. sections 1336 and 1398 did not change the law relative to the scope of review.

A recent Court of Claims case is in accord with the finding of the Court of Appeals in this action:

In *McLean Trucking Company* v. *United States*, 387 F2d 657 (Court of Claims) it was held:

> "Since the primary jurisdiction of the Commission has been invoked on the issue to be decided, we are reminded that the scope of our review is narrow. Unless the findings of the Commission are contrary to law, arbitrary, capricious or unsupported by substantial evidence they may not be set aside. *General Motors Corp.* v. *United States*, 324 F2d 604, 605 (6th Circuit 1963)."

As the courts have often said, the judicial function is exhausted when there is found to be a rational basis for

the Commission's conclusions. *Mississippi Valley Barge Co.* v. *United States*, 292 U.S. 282, 286-7 (1934). "After reviewing the record and weighing defendant's contentions in the light of these long-established precepts, we find that there is a rational basis for the Commission's conclusions."

The instant case, like the *McLean case*, supra, is governed by the provisions of 28 U.S.C. section 1336 (Respondent's Brief Appendix A, page 23) providing for exclusive jurisdiction in the District Court of cases referred to the Interstate Commerce Commission. Unlike *McLean*, the Petitioner here did not file action for review within 90 days in compliance with 28 U.S.C. section 1336(c) nor was the United States denominated party defendant as provided for in 28 U.S.C. section 2322. Accordingly, the Order of the Interstate Commerce Commission became final and binding on the Court as well as the parties.

In *Elgin Joliet and Eastern Railway Co.* v. *Benjamin Harris & Co.*, 245 F. Supp. 467 (1965) a similar situation existed and the Court held (at 471):

> "The effect of an agency determination—and hence the function of the Court once that determination became final—depends upon the effect which judicial action will have on the statutory scheme of regulation. If an Interstate Commerce Commission determination as to the reasonableness of rates were subject to collateral attack in each of the District Courts of the land, the regulatory function of the Commission would atrophy from impotence. Hence, as Justice Black pointed out, (*Pennsylvania R. Co.* v. *United States*, 363 U.S. 202) once the steps for direct judicial review of the Inter-

state Commerce Commission decision have been taken (or, as here, are not pursued) and the order becomes final, the outcome of the pending civil litigation is determined."

Inasmuch as the Commission's decision(335 I.C.C. 46) became final and binding on the District Court it could not be "rejected" (Petitioner's Appendix A, pages 25, 26). The Court of Appeals, however, provided the review which should have taken place under the provisions of 5 U.S.C. 706. The Court of Appeals, after a complete review of the entire record, found that the Commission's order was based upon substantial evidence and that it did not exceed the Commission's statutory authority (Petitioner's Brief, Appendix B, page 35 and cases cited). *Boston & Maine Railroad Co.* v. *United States,* 208 F. Supp. 661, *affirmed* 371 U.S. 26.

Although not argued by the Petitioner, it is clear that use of Modified Procedure by the Commission did not result in a denial of due process, *Yakus* v. *United States,* 321 U.S. 414, 436, particularly when the Petitioner made no request for cross-examination or other oral hearing. *Veillette* v. *Bowles,* 150 F2d 862.

Due process does not require oral hearing when, as here, there is no material factual conflict. The Courts have consistently held that fundamental fairness and due process are provided under the Interstate Commerce Commission's Modified Procedure. *National Trailer Convoy, Inc. et al.* v. *United States of America and Interstate Commerce Commission,* ('68) 293 F. Supp. 630 (DC - Okla.) *Aff'd. per curiam* ('69) 394 U.S. 849.

II. The District Court Was Not the Ultimate Trier of Fact on Issues Submitted to and Within the Primary Jurisdiction of the Interstate Commerce Commission.

The Petitioner having waived its right to a jury argues that the Court then becomes the "ultimate trier of fact," — in effect, the jury.

That this argument is fallacious and without merit is amply proven by the decisions. In *Cox* v. *United States*, 332 U.S. 442, 453 the Court said:

> "The concept of a jury passing independently on an issue previously determined by an administrative body is contrary to settled administrative practice; the constitutional right to have a jury trial does not include the right to have a jury pass on an administrative order. *Yakus* v. *United States*, 321 U.S. 414."

A rate different from the established rate under 49 U.S.C. Section 317 is void but the transportation is not wrongful and the legal charge therefor is recoverable. *Artic Roofing* v. *Travers*, 32 A2d 559.

The general policy that a rate filed with the Commission must be observed pervades the regulation of common carriers and is enforced by permitting any undercharges to be recovered in order to preserve the integrity of the filed rates. *Bowser & Campbell* v. *Knox Glass Inc.*, 390 F2d 193 (3rd Cir.) *cert. denied* 392 U.S. 907 (1968). This case is cited in the opinion of the Court of Appeals herein as compelling and applicable to the instant case. (Petitioner's Brief, Appendix B, page 39).

III. The Doctrines of Estoppel and Pari Delicto Are Not Applicable.

A motor carrier has a statutory duty and obligation to enforce collection of its lawful charges when the amounts paid for transportation are not in accordance with its published tariffs as filed with the Interstate Commerce

Commission. *Artic Roofing* v. *Travers*, supra, citing *Kansas City So. Railway* v. *Carl*, 227 U.S. 639.

The Interstate Commerce Commission has exclusive jurisdiction to determine the lawfulness of rates contained in tariffs filed with it. *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.*, 215 U.S. 481; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U.S. 247 (258-9) (cited by Petitioner in its Motion to Stay Action); *Terminal R. Association of St. Louis* v. *United States*, 266 U.S. 17.

Petitioner cites *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co., Inc.*, 159 F2d 306, *cert. denied* 331 U.S. 827 and *Shirks Motor Express Corp.* v. *Forster Transfer and Rigging Co., Inc.*, 133 A2d 59 (Md. 1957) as conflicting decisions warranting the granting of certiorari and holding that the legal doctrine of pari delicto is sufficient to prevent one common carrier from seeking undercharges from another common carrier.

Both cases can be distinguished on their facts. In the *Norfolk Southern Bus Co. case*, the parties were found to have entered into a pooling contract which was forbidden by the Interstate Commerce Act unless prior approval had been obtained from the Commission, 49 U.S.C. Section 305(1) and also the contract was in violation of the Sherman Anti-Trust Act Section 1, (15 U.S.C. 1) as being in restraint of trade.

In the *Shirks case*, the plaintiff was held to be in pari delicto because it had prior knowledge of and participated in an illegal contract. The contract in the instant case was not illegal; only the rates were improper. *Bowser & Campbell* v. *Knox Glass, Inc.*, supra.

Petitioner's citation of *Missouri Pacific Railroad Co.* v. *National Milling Co., Inc.*, 409 F2d 882 is inapposite. There the Court held that where a carrier marked a shipment prepaid in error and consignee reimbursed the insolvent consignor the amount of the freight bill, the consignee

could not be compelled to pay twice and the carrier could not recover.

It is submitted that the decision in the present case is in accord with *Bowser & Campbell* v. *Knox Glass, Inc.*, supra, a Third Circuit case and *Nyad Motor Freight, Inc.* v. *W. T. Grant Company*, D.C. So. Dist. NY February 13, 1970, wherein the Court stated:

> "It would be of no legal effect that the plaintiff and defendant had in fact agreed upon the reduced rates for carriage. Regulation was established by Congress in this field to avoid the ill effects of cut-throat competition. The integrity of the regulatory scheme requires that the companies abide by the filed rates. That scheme is so inviolate that the carrier will not be prevented from recovering the difference between the rate charged and the filed rate even by such common law defenses as estoppel, waiver, unclean hands or in pari delicto." citing *Bowser & Campbell* v. *Knox Glass, Inc.*, supra.

Nor was the Commission's decision in conflict with *Murphy Motor Freight Lines, Inc., Investigation and Revocation of Certificate*, 99 MCC 707 (1965) which involved a claim of unlawful lease arrangements which were rectified before the Commission rendered its final decision.

Although conceding that a carrier can recover undercharges from a shipper, the Petitioner cites *Little Rock & M. R. Co.* v. *St. Louis S. W. Railway Co.*, 63 F 775, 781 (Petitioner's Brief, page 16) as authority for contending that Respondent cannot recover undercharges from it. This case merely held that one railroad could make arrangements with one carrier for through billing, rating and use of terminals and tracks and not make similar arrangements

with other carriers. This case has been abrogated by Statute 49 U.S.C. Section 1(4).

No provision of the Interstate Commerce Act authorizes a common carrier in the absence of joint rates, as provided in 49 U.S.C. Section 316(c), to furnish transportation service for another common carrier under a contractual arrangement providing special compensation differing from that contained in its published tariffs. The Act clearly contemplates that the compensation which a motor common carrier receives from transportation service shall either be based upon its published tariffs (rates) filed with the Commission, where the haul is local, or takes the form of divisions of joint rates filed with the Commission, where the haul is joint, both divisions and rates being subject to Commission regulation. *Interstate Commerce Commission* v. *Baltimore and Ohio R.R. Co.,* 225 U.S. 326 cited with approval in *L. T. Barringer & Co.* v. *United States et al.,* 319 U.S. 1, 6, wherein the Court held the Act prohibited any differentiation of rates due to the identity of the one requesting the service.

The collection by an interstate carrier of a lower rate, other than that which is required under tariffs filed by the carrier, constitutes a discrimination in favor of the one paying the rate regardless of the intention of the parties. *Porto Transportation, Inc.* v. *Conso'idated Diesel Electric Corp.,* D.C.N.Y., 19 F.R.D. 256. *Interstate Commerce Commission* v. *North Pier Terminal Co.,* 164 F2d 640, held that a rebate, which the Interstate Commerce Act prohibits a carrier from making, need not be to an actual shipper and the Circuit Court in sustaining the District Court cited *Union Pacific Railroad* v. *United States,* 313 U.S. 450, as authority for holding that a rebate, which is prohibited, need not be to the shipper.

Section 1 of the Elkins Act, 49 U.S.C. Section 41, forbids "any person, persons or corporation" to give or receive any concession in respect to transportation, and the phrase

"any person, persons, or corporation" includes carriers as well as shippers. *United States* v. *Braverman*, 373 U.S. 405; *American Trucking Association* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 387 U.S. 397.

IV. Decision of Court of Appeals Does Not Raise a Question of Importance Nor Does It Conflict With Decisions of Other Courts.

It is obvious that there is no important question of Federal law which has not already been settled by this Court. The basic issue in this action is: Can Petitioner avoid the requirements of the Interstate Commerce Act by entering into a contract for carriage with another carrier? This Court, as long ago as 1906, decided the answer to this question in the negative.

In *New Haven Railroad* v. *Interstate Commerce Commission*, 202 U.S. 361 at 391 the Court said,

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied."

In its Order (Petitioner's Brief Appendix F, page 62) the Commission pointed this out and it said,

> "On account of their past association and contractual relationship, Transamerican alleges that Locust was not a common carrier with respect to Transamerican, regardless of its public status otherwise. This implies that a carrier may avoid the requirements of the national transportation policy and the Interstate Commerce Act merely by entering into a contract for carriage with another carrier. The power of Congress to regulate commerce cannot be fettered by the maintenance of existing agreements which conflict therewith. The result would be to withdraw as much of the regulation of commerce from the control of Congress as private individuals arbitrarily choose. See *Colorado Interstate Gas Co.* v. *Federal Power Com'n.*, 142 F.2d 943, 953 (1944), citing *Sproles* v. *Binford*, 286 U.S. 374, 390 (1932)."

The Respondent submits that the decision of the Court of Appeals in this case does not conflict with decisions of other courts. The cases of *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co., Inc.*, supra, and *Shirks Motor Express Corp.* v. *Forster Transfer and Rigging Co., Inc.*, supra, cited by Petitioner, are clearly distinguishable from the instant case on their facts as previously argued by the Respondent herein (Respondent's Brief page 16). In fact, the decision is wholly consistent with the decisions of the Third Circuit, *Bowser & Campbell* v. *Knox Glass, Inc.*, supra, the District Court in *Nyad Motor Freight, Inc.* v. *W. T. Grant Company*, supra, previously argued herein (Respondent's Brief, page 17) and the Court of Claims in *McLean Trucking Company* v. *United States*, supra, (Respondent's Brief, pages 12-13).

V. Unreasonable Delay by Petitioner.

The records show that this litigation has been constantly delayed by the Petitioner's conduct. Petitioner delayed from late 1963 (when Respondent was advised by representatives of the Interstate Commerce Commission that the rate was improper) until October, 1964 when a concurrence became effective, nearly a year later. On November 29, 1966 the Court ordered the parties to seek the Interstate Commerce Commission's opinion (which Respondent did—Petitioner's Appendix D, page 45) and the Petitioner neglected to comply with the Court's order until October 3, 1967 when it suddenly asserted the Commission's primary jurisdiction (Respondent's Appendix B, page 29). This action resulted in another delay until May 7, 1969 and further court proceedings were delayed until after rights to judicial review in accordance with 28 U.S.C. Section 1336(c) had expired.

In the light of the Petitioner's unreasonable delay and the fact that its petition is without merit, it is urged that this controversy terminate now. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621.

Conclusion

For the foregoing reasons, the Respondent hereby respectfully requests that the petition be denied and for the Court to adjudge to the Respondent reasonable damages for its delay in accordance with the provisions of Rule 56(4) of the Rules of the Supreme Court.

Respectfully submitted,

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APPENDIX A

Statutes and Rules of Court Involved

5 U.S.C. § 554

* * *

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966. 80 Stat. 384.

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall

review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

28 U.S.C. § 1336 Interstate Commerce Commission's Orders

* * *

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final. As amended Aug. 30, 1964, Pub.L. 88-513, § 1, 78 Stat. 695.

49 U.S.C. § 316(b) [Duties of Common Carriers]

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

49 U.S.C. § 317(b)

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different

compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: Provided, That the provisions of sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

INTERSTATE COMMERCE COMMISSION GENERAL RULES OF PRACTICE

Rule 53—Modified procedure; hearings.

(a) *Request for cross examination or other hearing.* If cross examination of any witness is desired the name of the witness and the subject matter of the desired cross examination shall, together with any other request for oral hearing, including the basis therefor, be stated at the end of defendant's statement or complainant's statement in reply as the case may be. Unless material facts are in dispute, oral hearing will not be held for the sole purpose of cross examination.

(b) *Hearing issues limited.* The order setting the proceeding for oral hearing, if hearing is deemed necessary, will specify the matters upon which the parties are not in agreement and respecting which oral evidence is to be introduced.

REHEARING; REARGUMENT; OR RECONSIDERATION

Rule 101—Petitions for rehearing, reargument, or reconsideration.

(a) *In general.* (1) A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

(2) *Administrative finality of division and employee board decisions.* All decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes, or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division: *Provided, however,* That this subparagraph shall not preclude the seasonable filing of a petition for relief under paragraphs (b) and (c) of this section, to be considered and disposed of by the division or appellate division which made the decision, order, or requirement as to which relief is sought. Decisions of an employee board, whether original or on review, are not administratively final. Such employee board decisions shall be subject to review by an appropriate appellate division of the Commission upon the filing of a timely petition in accordance with these rules of practice.

(3) *Limitations on petitions for review of division decisions.* Pursuant to authority granted in section 17(6) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division of the Commission in any proceeding shall be limited and restricted to those proceedings in which the entire Commission, on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes, or modifies a prior decision by a hearing officer or where the initial

decision is made by a division, a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and with administrative finality.

(4) *Petitions seeking a finding that an issue of general transportation importance is involved; 3-page limitation; time for filing; no reply permitted.* In any proceeding which has involved the taking of evidence at oral hearing or by modified procedure in which the Commission has not noted the presence of an issue of general transportation importance, any party may, within 15 days after the service of a final decision, order, or requirement of a division or appellate division, as to which the filing of a petition for rehearing, reargument, or reconsideration is not permitted, file a petition requesting the Commission to find on its own motion that the proceeding is one involving an issue of general transportation importance. Any petition seeking such a finding shall not be considered an application for rehearing, reargument, or reconsideration within the meaning of section 17 of the act and shall not exceed 3 pages. No reply thereto may be filed and the ruling thereon will be final. Petitions seeking the relief specifically covered herein will not be entertained at any other stage of the proceeding.

(5) *Copies of petitions and replies.* In cases in which it has been determined and announced that an issue of general transportation importance is involved, there shall be furnished for the use of the Commission the original and 14 copies of each petition filed under this section and of replies to such petitions. A like number of copies shall be furnished of petitions seeking a finding that the proceeding involves an issue of general transportation importance. In all other cases, the original and 7 copies of such petitions and replies shall be furnished for the use of the Commission.

(b) *Rehearing or further hearing.* When in a petition filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(c) *Modification of effective date.* A petition under this section seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed therein, must be filed seasonably, except that, in case of unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

(d) *Reconsideration.* If relief under this section other than under paragraphs (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in Rule 96(a), as should also any substitute finding or other substitute requirement desired by petitioner.

(e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this section must be filed within 30 days after the date of service of a decision or order, except as otherwise provided in the special rules of practice.

(f) *Successive petitions on same grounds, not entertained.* A successive petition under this section submitted by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission will not be entertained.

(g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* When an ap-

pellate division has denied a petition seeking a reversal, change, or modification of a determination whether original or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (c) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition.

Rule 102—Petitions not otherwise covered.

When the subject matter of any desired relief is not specifically covered by the rules in this part, a petition seeking such relief, which relief shall be construed as including appropriate discovery procedures, and stating the reasons therefor may be served and filed.

Rules of the Supreme Court of the United States

Rule 56. Interest and Damages

* * *

4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No. 65-144-W

LOCUST CARTAGE COMPANY, INC.

v.

TRANSAMERICAN FREIGHT LINES, INC.

MOTION TO STAY ACTION

Defendant moves that this action be stayed for the reason that there are certain underlining factual issues involved which are determinative of the rights of the parties to this action which are within the primary jurisdiction of and/or must properly be resolved by the Interstate Commerce Commission.

Thompson, Trustee v. *Texas Mexicon Railway System*, 328 U.S. 134 (1946)
General American Tank Carrier Corp. v. *El Dorado Terminal Co.*, 308 U.S. 422 (1939)
Rochester Telephone Corp. v. *U.S. et al*, 307 U.S. 125 (1939)
Great Northern Railway Company v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922)
Mitchell Coal & Coke Company v. *Pennsylvania Railroad Co.*, 230 U.S. 247 (1912)
Southern Railroad Co. v. *Tift*, 206 U.S. 408 (1907)

Texas & Pacific Railroad Company v. *Abilene Cotton Oil Co.*, 204 U.S. 426.

By its attorney,

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